IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION NO. 115 OF 2005

1. Shri Jose Cristovam Pinto,
   and his wife,

2. Mrs. Thelma Pinto,

   Both majors, Indian national,
   and residing at Alto-Betim,
   Bardez-Goa. ... Applicants

versus

1. M/s. Sahajanand Investments
   Pvt. Ltd., A company duly
   registered under the provisions
   of the Companies Act, 1956,
   having its registered office at 9,
   Diamond Chambers, 18th June Road,
   Panaji-Goa, represented by its
   Director, Shri Rasikalal Mohanlal
   Gangani, Resident of Galaxy Building,
   Dr. A. B. Road, Panaji-Goa.

2. M/s. C. Pinto Constructions,
   a partnership concern,
   having its office at Betim,
   Bardez,Goa.

3. Shri Rui Manuel Pinto,
   married, of full age,
   residing at Alto-Betim,
   Bardez, Goa.

4. Shri Fernando Sylvester de
Sa Pinto, married, of full age,
residing at Alto-Betim,
Bardez-Goa. ... Respondents

Mr. Shivan Dessai, Advocate for the Applicants.

Ms. A. Gaunekar, Advocate for Respondent No.1.

Mr. Yogesh Naik, Advocate for Respondent Nos.2, 3 and 4.

CORAM : N. A. BRITTO, J.

DATE : 9TH SEPTEMBER, 2005.

ORAL JUDGMENT

The applicants herein are accused nos. 2 and 3 in C.C. No.587/2002/OA/B filed against them by the complainant-respondent no.1 herein under Section 138 of the Negotiable Instruments Act, 1881(Act, for short) and against whom process has been issued under the said Section, by Order dated 3-5-2003 of the learned J.M.F.C., Panaji.

2. The applicants have invoked the extra-ordinary jurisdiction of this Court under Section 482 of the Code of

Criminal Procedure, 1973(Code, for short) to quash and set aside the said Order issuing process against them.

3. This Court by Order dated 8-7-2005 had granted interim relief in favour of the applicants and had stayed further proceedings in the said criminal case.

4. There is no dispute as to the facts of the case. Both the applicants are the parents of Rui Manuel Pinto and Fernando Sylvester de Sa Pinto(A-4 and A-5) in the said criminal case and Francisco Jose de Sa Pinto. The said 3 sons of the applicants have entered into a Partnership Deed dated 28-5-1996 for the purpose of carrying out business of construction and thereafter the said Francisco Jose de Sa Pinto had retired from the said partnership in the year 2001.

5. The applicants entered into an Agreeement dated 5-1-2000 wherein the terms of Consent Decree dated 17-4-1998 passed in Special Civil Suit No.255/92/A between the applicants and respondent no.1-complainant were modified and thereafter in supersession of the said agreement dated 5-1-2000 the

applicants entered into another agreement dated 6-4-2002 with respondent no.1-complainant in lieu of and for the satisfaction of the Consent Decree dated 17-4-1998.

6. In pursuance to the said agreement, there were several cheques which are the subject-matter of different complaints for making payment in satisfaction of the Concent Decree issued to the respondent no.1-complainant by accused no.1/M/s. C. Pinto Constructions of which accused nos.4/Rui Manuel Pinto and acussed no.5/Fernando Sylvester de Sa Pinto were partners and the said cheque was in fact signed by A-4/Rui Manuel Pinto. The complainant presented the said cheque No.058355 dated 6-4-2002 for Rs.5,00,000/- drawn on Global Trust Bank on 19-6-2002 which was returned by the bankers with remark "Insufficient Funds" whereupon the complainant issued a legal notice dated 1-7-2002 to the applicants and accused nos.4 and 5 and thereafter proceeded to file a complaint under Section 138 of the said Act, and the learned J.M.F.C. was pleased to issue process against the applicants as well as accused nos.4 and 5.

7. On or about 21-7-2003, the applicants entered into another agreement in supersession of the earlier agreement dated 6-4-2002 with accused no.1/M/s. C. Pinto Constructions and fresh terms were drawn by the parties for the satisfaction of the said Consent Decree.

8. The applicants have stated that the said cheque was drawn by the accused no.1/M/s. C. Pinto Constructions pursuant to the said agreement dated 6-4-2002. It is the contention of the applicants that Section 138 of the said Act stipulates that where any cheque drawn by a person on an account maintained by him with a Banker for payment of any amount of money to another person from out of that account for discharge, in whole or in part, of any debt or other liability, is returned by the Bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that Bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment. It is the contention of the applicants that the provision of Section

138 mandates that it is only that person who has drawn a cheque on the account maintained by him for discharge of any debt or liability, that is liable for prosecution under the said provision and since the said cheque was issued by A-1/M/s. C. Pinto Constructions through one of its partners namely, A-4/Rui Manuel Pinto it is accused no.1/M/s. C. Pinto Constructions through its partners A-4/Rui Manuel Pinto and A-5/Fernando Sylvester de Sa Pinto who would be liable to be prosecuted under the said provision. It is their contention that the applicants are not the drawers of the said cheque and have not signed or endorsed anywhere on the said cheque and inspite of that the complainant having full knowledge that the applicants are not liable to be prosecuted under the said Section of the said Act has intentionally and malafidely impleaded the applicants in the said complaint.

9. On the other hand, it is the contention of the complainant that the applicants have always represented to the said complainant that they too were the partners of the said firm-A-1/M/s. C. Pinto Constructions along with their said sons, namely, A-4/Rui Manuel Pinto and A-5/Fernando Sylvester de Sa

Pinto and since the cheques were given towards the liability incurred by the applicants, the applicants would also be liable for the dishonour of the said cheques.

10. On behalf of the complainant reliance has been placed on several decisions which are clearly inapplicable to the facts of the case at hand. In the case of **Sunrise Oleo Chemicals Ltd. and another** v. **M/s. K. M. Enterprises and another**(2003(2) DCR 561) accused no.1/M/s. Oleo Chemicals Limited was owing certain amounts to the complainant and accused no.2 was the Manging Director of the said M/s. Sunrise Oleo Chemicals Ltd. Accused No.2 had issued a cheque drawn on the account maintained by M/s. Sunrise Oil Mills Private Limited which cheque was dishonoured for insufficient funds. The contention raised was that the drawer of the cheque being M/s. Sunrise Oil Mills Private Limited the complaint could not be maintained as against Sunrise Oils Limited. In rejecting the said contention, the Court stated that the complainant had clarified that the accused no.2 was the Managing Director of Sunrise Oil Mills Limited as well as Sunrise Oleo Chemicals Limited and that since no funds were available in the account of Sunrise Oleo Chemicals Limited

he had issued the cheque in discharge of the liability of the first accused-Company which statement of the complainant had remained uncontroverted and, therefore, it was obvious that Sunrise Oleo Chemicals Limited the first accused-Company and Sunrise Oil Mills Limited were the sister concerns and the Manging Director of both the Companies was one and the same and was no other than the second accused. The Court also noted that in the reply to the notice on behalf of Sunrise Oleo Chemicals Limited signed by the second accused no objection whatsoever was taken on the premise that the first accused was not the drawer of the cheque and, therefore, it was unreasonable to contend that the first accused-Company was not validly prosecuted since it was not the drawer of the cheque.

11. The case of **Bindu David George** v. **Malanadu Development Society**(2003(2) DCR 203) was a case where specific allegation was made in the complaint that the business of the firm was carried on by all the accused who were the partners of the firm and, therefore, it was held that all respondents were responsible for conduct of business of firm and liable to be proceeded against under Section 138 of the Act and

if any of the partners were not responsible it was for them to establish the same during trial.

12. As already stated, there is no dispute in this case that the cheque was issued by accused no.1/M/s. C. Pinto Constructions and was signed by accused no.4/Rui Manuel Pinto and was given in satisfaction of the liability of the applicants as per agreement dated 6-4-2002. The submission that the applicants always represented to the complainant that they too were the partners of the firm A-1/M/s. C. Pinto Constructions is not borne out either from the complaint nor from the affidavit filed in support thereof at the stage prior to issuing process against the accused. All that the complainant stated in the said complaint as well as in the affidavit is that "the accused no.1 is a partnership concern represented by its partners, accused nos.2 to 5" and that "the accused in discharge and part payment of a legally enforceable liability payable by the accused to the complainant, the accused issued to the complainant a cheque drawn in the sum of Rs. 5,00,000/-(Rupees Five Lakhs only) dated 6-4-2002 drawn on Global Trust Bank Limited, Miramar, Goa". In other words, what was stated in the complaint has been repeated in the affidavit. The complainant has also stated in his complaint that he contacted the accused and informed him about the dishonour of the cheque issued by the accused. As already seen,

accused no.1 is a firm and the accused could certainly not have contacted the said firm unless it was done through one of its partners. Section 138 of the said Act makes liable only that person who has drawn the cheque on an account maintained by him for the discharge of any debt or liability. The applicants admittedly are not the drawers of the said cheque nor did they sign the same nor endorse the same and, therefore, they could not have been prosecuted under Section 138 of the Act only because the cheque was given by the firm of which two of the sons of the applicants were partners to satisfy the debt or liability of the applicants under the said agreement dated 6-4-2002. The complainant did not even file the partnership deed to show who were the partners of the firm. It is also not the case of the complainant that the applicants along with their two sons, namely, accused nos.4/Rui Manuel Pinto and accused no.5/Fernando Sylvester de Sa Pinto were in charge of and were responsible to the said firm of A-1/M/s. C. Pinto Constructions at the time the offence was committed for the conduct of the business of the said firm. If that was the case then Section 141 of the said Act would have taken care of but there is no averment to that effect in the complaint or for that matter the affidavit in evidence filed in support thereof. Since the complaint contains no allegation that the applicants herein were the partners who were in charge of or responsible to the said firm for the conduct of the business of the said firm no process against them

could have been issed when admittedly on the face of it the cheque was issued only by A-1/M/s. C. Pinto Constructions through A-4/Rui Manuel Pinto. Since the applicants are not the drawers of the said cheque nor there is any averment in the complaint that they too were the partners of the firm A-1/ M/s. C. Pinto Constructions of which A-4/Rui Manuel Pinto and A-5/Fernando Sylvester de Sa Pinto who were in charge of and responsible to the said firm for the conduct of the business, the learned J.M.F.C. was not justified in issuing process against them and, therefore, the Order issuing process against the applicants deserves to be quashed and set aside. If any authority is required to support the aforesaid proposition, we may refer to the case of **Monaben K. Shah** v. **State of Gujarat and others**(2004(7) SCC 15 wherein the Apex Court stated thus:

> "The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable".

13. Therefore, the petition needs to succeed. The impugned Order dated 3-5-2003 as far as the applicants/A-2 and A-3 are concerned the same is hereby quashed and set aside. The complaint to proceed in accordance with law against A-1/M/s. C. Pinto Constructions,

A-4/Rui Manuel Pinto and A-5/Fernando Sylvester de Sa Pinto. Petition is allowed with no order as to costs.

N. A. BRITTO, J.

RD.